STATE PRACTICE OF ASIAN COUNTRIES IN THE FIELD OF INTERNATIONAL LAW*

JAPAN

JUDICIAL DECISIONS¹

The requirements of Articles 20(3), 2(1), 26 and 27 of the International Covenant on Civil and Political Rights; Rights of Ainu as a Minority and an Indigenous People

Sapporo District Court, 27 March 1997

Hanrei Jiho [Judicial Reports] No.1598 (1997) 33

X ET AL. v. HOKKAIDO EXPROPRIATION COMMISSION (the State intervened)

The plaintiffs, who belonged to a minority of the Japanese population and who were landowners in the Nibutani area, brought an action against the Hokkaido Expropriation Commission for the revocation of a decision on the expropriation of land for the construction of the Nibutani dam, contending that the authorization for the dam project was illegal.

The Court ruled that it was necessary to balance the public interests that would be served by the project and the public or private interests that would suffer from it, in order to meet the requirement of Article 20 paragraph 3 of the Land Expropriation Law ("The project must contribute to the proper and reasonable use of the land").

Article 2 paragraph 1, Article 26 and Article 27 of the International Covenant on Civil and Political Rights guarantee to persons belonging to a minority the right to enjoy their own culture and oblige the Contracting Parties to give careful attention to this right. The plaintiffs belong to the Ainu who are not only a minority part of the population in Japan, but who also constitute an indigenous people.

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The public interests that would be served by the project are the prevention of flood in the area and the constant delivery of water for agriculture, industry and city consumption and the production of electric power. On the other hand, as for the interests and values that would suffer from the project, the area to be expropriated was a sacred place for the Ainu people, a place with the highest percentage of Ainu population in Japan and the place where the study of Ainu culture started. There was a close and unique relationship between Ainu culture and the natural environment cultivating that culture. The substance and spirit of Ainu culture with its close relationship with nature were maintained to the present day. Consequently the area to be expropriated clearly has ethnic, cultural, historical and religious values for the Ainu people. Those values are indeed also important for those citizens who are not Ainu.

Balancing these public and private interests and values, the last mentioned interests and values are to be considered human rights within the meaning of Article 27 of the International Covenant on Civil and Political Rights and Article 13 of the Japanese Constitution. Consequently, when an administrative state organ takes a policy decision that holds the possibility of injuring these rights, it should give due consideration to the culture and other aspects of indigenous people so as not to unreasonably violate these people's rights.

For these reasons and on the basis of the evidence, the Minister must be considered to have neglected both the necessary procedures for research and study in order to decide if the values served by the project would prevail over the values that would suffer loss, and the values that were to be respected most. Accordingly, the authorization for the project of the construction of the Nibutani dam was illegal; this brought with it the illegality of the decision on the expropriation of the land needed for the construction of the Nibutani dam.

The relationship between High Seas, Territorial Sea and Fishery Zone; Effect of the extension of the territorial sea

Hiroshima High Court, Matsue Branch, 11 September 1998

Hanrei Jiho (Judicial Reports) No.1656 (1998) 56

PROSECUTOR v. X

This is the judgment rendered on the appeal against the decision of the Matsue District Court, Hamada Branch, of 15 August 1997 (this *Yearbook* Vol.7 at 287).¹¹ The High Court ruled that the original judgment should be reversed, and remanded the case to the Matsue District Court.

The High Court ruled that the original judgment could not be approved for the following reasons. *First*, the area in question had become part of the Japanese territorial sea by the new Law of 1977 that adopted the system of straight baselines for the delimitation of the territorial sea. Since it is an established principle of international law that a coastal state has sovereignty over its territorial sea, it is reasonable that Japan has judicial jurisdiction over the area.

Second, the original judgment held that Japan renounced the exercise of sovereignty over the part of the area outside the fishery zone under the 1965 Japan-Korea Agreement on Fisheries. This was based on the understanding that the Agreement

referred not only to the high seas but also to the territorial sea. This interpretation was, however, not correct for the following reasons:

First, international law divides the sea into territorial sea and high seas. The fishery zone is the sea area beyond and adjacent to the territorial sea where the coastal state may exercise exclusive jurisdiction over fishery matters. This zone is established in the high seas and is not located in the territorial sea. The zone cannot be in the territorial sea. Second, against this background it may be concluded that the Agreement presumed the sovereignty of the coastal state over its territorial sea and aimed at the solution of fishery problems on the high seas. Thus the Agreement referred to a fishery zone under international law and not to the territorial sea.

THE PHILIPPINES*

JUDICIAL DECISIONS

(Supreme Court)

Immunity of Asian Development Bank and its President and officers from legal processes

G.R.No.113191, 18 September 1996

DEPARTMENT OF FOREIGN AFFAIRS *v.* NATIONAL LABOR RELATIONS COMMISSION

First Division

The Asian Development Bank (ADB) was sued by a dismissed employee for illegal dismissal and charged with violating the “labor-only” contracting law. ADB and the Department of Foreign Affairs (DFA) notified the Labor Arbiter that the ADB, its President and officers were covered by an immunity from legal processes except for borrowings, guaranties or the sale of securities pursuant to Article 50(1) and Article 55 of the Agreement Establishing the Asian Development Bank (the “Charter”)¹ in relation to Section 5 and Section 44 of the Agreement Between the Bank and the Government of the Philippines regarding the Bank’s Headquarters (the

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¹ Article 50(1) of the Charter provides: “The bank shall enjoy immunity from every form of legal process, except in cases arising out of or in connection with the exercise of its powers to borrow money, to guarantee obligations, or to buy and sell or underwrite the sale of securities.” Article 55 thereof provides: “All Governors, Directors, alternates, officers and employees of the Bank, including experts performing missions for the Bank:

1) shall be immune from legal process with respect of acts performed by them in their official capacity, except when the Bank waives the immunity.

2) ...”

“Headquarters Agreement”).² The DFA lodged this petition for certiorari with the Supreme Court when the NLRC refused to vacate the judgment rendered against ADB.

The Supreme Court ruled that ADB was immune from suit as provided in both its Charter and the Headquarters Agreement, stating: “The provisions of both instruments clearly state that, except in the specific cases of borrowing and guarantee operations, as well as the purchase, sale and underwriting of securities, ADB enjoys immunity from legal process of every form. The Bank’s officers, likewise, enjoy such immunity for all acts performed by them in their official capacity. The Charter and Headquarters Agreement granting these immunities and privileges are treaty covenants and commitments voluntarily assumed by the Philippine government which must be respected.”

The Court cited its previous holding in *World Health Organization v. Aquino*, where it held:

“It is a recognized principle of international law and under our system of separation of powers that diplomatic immunity is essentially a political question and courts shall refuse to look beyond a determination by the executive branch of the government, and where the plea of diplomatic immunity is recognized and affirmed by the executive branch of the government... it is then the duty of the courts to accept the claim of immunity upon appropriate suggestion by the principal law officer of the government, ... or other officer acting under this direction. Hence, in adherence to the settled principle that courts may not so exercise their jurisdiction... as to embarrass the executive arm of the government in conducting foreign relations, it is accepted doctrine that “in such cases the judicial department of government follows the action of the political branch and will not embarrass the latter by assuming an antagonistic jurisdiction.”

The Court found that the filing by the DFA, in behalf of ADB, is itself an affirmation of the government’s own recognition of the immunity of ADB. Being an international organization that has been extended a diplomatic status, ADB is independent of municipal law, in order that it be free from any interference by the local government in its operations and make it free of any subjection to local jurisdiction which might impair its capacity as such body to discharge its responsibilities impartially on behalf of its member-states.

² Section 5 of the Headquarters Agreement reads: “The Bank shall enjoy immunity from every form of legal process, except in cases arising out of, or in connection with, the exercise of its powers to borrow money, to guarantee obligations, or to buy and sell or underwrite the sale of securities.”

Section 44 thereof provides: “Governors, other representatives of Members, Directors, the President, Vice-President and executive officers as may be agreed upon between the Government and the Bank shall enjoy, during their stay in the Republic of the Philippines in connection with their official duties with the Bank:

....

(b) Immunity from legal process of every kind in respect of words spoken or written and all acts done by them in their official capacity.”

Constitutionality of participation in treaty on worldwide trade liberalization; lack of jurisdiction in the field of “the unchartered ocean of social and economic policy making”; (non-) self-executing character of Constitutional provisions; voluntary restriction and limitation of sovereignty by participation in treaties; generally accepted principles of international law automatically part of municipal law

G.R.No.118295, 2 may 1997

TANADA, et al. vs. ANGAR, et al.

En banc

In December 1994, the Philippines ratified the Agreement Establishing the World Trade Organization (hereinafter the “WTO Agreement”) through Senate Resolution No. 97. Following the ratification, certain members of the Senate and several non-government organizations filed the present tax-payer suit assailing the Philippine ratification of the WTO Agreement as violating the mandate of the 1987 Constitution to “develop a self-reliant and independent national economy effectively controlled by Filipinos.”³ The issue, as framed by the Court, was whether the “Philippine Constitution prohibits Philippine participation in worldwide trade liberalization and economic globalization? Does it proscribe Philippine integration into a global economy that is liberalized, deregulated and privatized?”

The Court ruled that the ratification by the Philippines of the WTO Agreement was constitutional, stating that petitioners’ reliance on Article II, section 19 was misplaced:

“By its very title, Article II of the Constitution is a “declaration of principles and state policies.” ... These principles in Article II are not intended to be self-executing principles ready for enforcement through the courts. They are used by the judiciary as aids or as guides in the exercise of its power of judicial review, and by the legislature in its enactment of laws. As held in the leading case of *Kilosbayan, Inc. vs. Morato*, the principles and state policies enumerated in Article II and some sections of Article XII are not ‘self-executing provisions, the disregard of which can give

³ Specifically, the petitioners anchored their arguments on Section 19, Article II and Sections 10 and 12 of Article XII.

Section 19, Article II provides: “The State shall develop a self-reliant and independent national economy effectively controlled by Filipinos.”

Section 10, Article XII provides “... The Congress shall enact measures that will encourage the formation and operation of enterprises whose capital is wholly owned by Filipinos.

In the grant of rights, privileges, and concessions covering the national economy and patrimony, the State shall give preference to qualified Filipinos.”

Section 12, Article XII provides “The State shall promote the preferential use of Filipino labor, domestic materials and locally produced goods, and adopt measures that help make them competitive.”

rise to a cause of action in the courts. They do not embody judicially enforceable constitutional rights but guidelines for legislation.”

The Court stated further that “(t)he reasons for denying a cause of action to an alleged infringement of broad constitutional principles are sourced from basic considerations of due process and the lack of judicial authority to wade ‘into the uncharted ocean of social and economic policy making.’”

The Court clarified its ruling in *Manila Prince Hotel vs. GSIS*, stating that its application was limited to “the ‘grant of rights, privileges and concessions covering national economy and patrimony’ and not to every aspect of trade and commerce. It refers to exceptions rather than the rule. The issue here is not whether this paragraph of Sec. 10 of Article XII is self-executing or not. Rather, the issue is whether, as a rule, there are enough balancing provisions in the Constitution to allow the Senate to ratify the Philippine concurrence in the WTO Agreement. And we hold that there are.”

Further, the Court stated:

“All told, while the Constitution indeed mandates a bias in favor of Filipino goods, services, labor and enterprises, at the same time, it recognizes the need for business exchange with the rest of the world on the bases of equality and reciprocity and limits protection of Filipino enterprises only against foreign competition and trade practices that are unfair. In other words, the Constitution did not intend to pursue an isolationist policy. It did not shut out foreign investments, goods and services in the development of the Philippine economy. While the Constitution does not encourage the unlimited entry of foreign goods, services and investments into the country, it does not prohibit them either. In fact, it allows an exchange on the basis of equality and reciprocity, frowning only on foreign competition that is *unfair*. [Emphasis in original.]

....

The WTO reliance on “most favored nation,” “national treatment,” and “trade without discrimination” cannot be struck down as unconstitutional as in fact they are rules of equality and reciprocity that apply to all WTO members. Aside from envisioning a trade policy base on “equality and reciprocity,” the fundamental law encourages industries that are “competitive in both domestic trade environment, but one in favor of the gradual development of robust industries that can compete with the best in the foreign markets. Indeed, Filipino managers and Filipino enterprises have shown capability and tenacity to compete internationally. And given a free trade environment, Filipino entrepreneurs and managers in Hong Kong have demonstrated the Filipino capacity to grow and to prosper against the best offered under a policy of *laissez faire*.”

Finally, on the question of sovereignty, the Court stated:

“However, while sovereignty has traditionally been deemed absolute and all-encompassing on the domestic level, it is however subject to restrictions and limitations voluntarily agreed to by the Philippines, expressly or impliedly, as a member of the family of nations. Unquestionably, the Constitution did not envision a hermit-type isolation of the country from the rest of the world. In its Declaration of Principles

and State Policies, the Constitution ‘adopts the generally accepted principles of international law as part of the law of the land, and adheres to the policy of peace, equality, justice, freedom, cooperation and amity, with all nations.’ By the doctrine of incorporation, the country is bound by generally accepted principles of international law, which are considered to be automatically part of our own laws. One of the oldest and most fundamental rules in international law is *pacta sunt servanda* – international agreements must be performed in good faith. ‘A treaty engagement is not a mere moral obligation but creates a legally binding obligation on the parties... A state which has contracted valid international obligations is bound to make in its legislations (*sic*) such modifications as may be necessary to ensure the fulfillment of the obligations undertaken.’

By its inherent nature, treaties really limit or restrict the absoluteness of sovereignty. By their voluntary act, nations may surrender some aspects of their state power in exchange for greater benefits granted by or derived from a convention or pact. After all, states, like individuals, live with coequals, and in pursuit of mutually covenanted objectives and benefits, they also commonly agree to limit the exercise of their otherwise absolute rights. Thus, treaties have been used to record agreements between States concerning such widely diverse matters as, for example, the lease of naval bases, the sale or cession of territory, the termination of war, the regulation of conduct of hostilities, the formation of alliances, *the regulation of commercial relations*, the settling of claims, the laying down of rules governing conduct in peace and the establishment of international organizations. The sovereignty of a state therefore cannot in fact and in reality be considered absolute. Certain restrictions enter into the picture: (1) limitations imposed by the very nature of membership in the family of nations and (2) limitations imposed by treaty stipulations. ...”

In closing, the Court made the following statement:

“... Notwithstanding objections against possible limitations on national sovereignty, the WTO remains as the only viable structure for multilateral trading and the veritable forum for the development of international trade law. The alternative to WTO is isolation, stagnation, if not economic self-destruction. ...”

Conflict of laws; Jurisdiction of Philippine Courts to be based on the paramountcy of the private interest of the litigant, enforceability of the judgment, fair trial, avoidance of inconvenient forum; Factors determining choice of applicable law

G.R.No.122191, 8 October 1998

SAUDI ARABIA AIRLINES v. COURT OF APPEALS, MILAGROS P. MORADA and HON. RODOLFO A. ORTIZ

First Division

Petitioner Saudi Arabian Airlines (“SAUDIA”), based in Jeddah, Saudi Arabia, employed private respondent MORADA as a flight attendant. In 1990, while on a layover in Jakarta, Indonesia, private respondent, after a night out with two male fellow-crew members, was attacked by one of her co-workers. The attack was averted

by hotel personnel who contacted Indonesian police and effected the arrest of the perpetrators. Because of the incident in Jakarta, the private respondent was subjected to harassment by SAUDIA pressuring her to drop the accusations against her attacker and his accomplice. She refused to do so, and instead found herself tried before a Saudi Court, in proceedings not made known to her, for the events that transpired in Jakarta. The case was later dismissed by the Prince of Makkah on the ground that private respondent was wrongfully convicted. Thereafter, SAUDIA terminated private respondent, whereupon private respondent filed a case for damages against SAUDIA.

The Court ruled that there was indeed a “conflict of laws” issue before it. As stated by the Court:

“A factual situation that cuts across territorial lines and is affected by the diverse laws of two or more states is said to contain a foreign element.’ The presence of a foreign element is inevitable since social and economic affairs of individuals and associations are rarely confined to the geographic limits of their birth or conception.

The forms in which this foreign element may appear are many. The foreign element may simply consist in (*sic*) the fact that one of the parties to a contract is an alien or has a foreign domiciles, or that a contract between nationals of one State involves properties situated in another State. In other cases, the foreign element may assume a complex form.

In the instant case, the foreign element consisted in the fact that private respondent MORADA is a resident Philippine national, and that petitioner SAUDIA is a resident foreign corporation. Also, by virtue of the employment of MORADA with the petitioner SAUDIA as a flight stewardess, events did transpire during her many occasions of travel across national borders, ... that caused a ‘conflicts’ situation to arise.”

Applying the rules of “conflicts” the Court found the Regional Trial Court (RTC) to be possessed of jurisdiction over the case:

“Pragmatic considerations, including convenience of the parties, also weigh heavily in favor of the RTC of Quezon City assuming jurisdiction. Paramount is the private interest of the litigant. Enforceability of a judgment if one is obtained is quite obvious. Relative advantages and obstacles to a fair trial are equally important. Plaintiff may not, by choice of an inconvenient forum, ‘vex’, ‘harass’, or ‘oppress’ the defendant, e.g. by inflicting upon him needless expense or disturbance. But unless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed.

Weighing the relative claims of the parties, the court *a quo* found it best to hear the case in the Philippines. Had it refused to take cognizance of the case, it would be forcing plaintiff (now private respondent) to seek remedial action elsewhere, i.e., in the Kingdom of Saudi Arabia where she no longer maintains substantial connections. That would have been unfair to her as well as a burden.

Moreover, by hearing the case in the Philippines no unnecessary difficulties and inconvenience have been shown to either of the parties. The choice of forum of the plaintiff (now private respondent) should be upheld.”

As to the choice of applicable law, the Court made the following statement:

“(T)he choice-of-law problems seek to answer two important questions: (1) What legal system should control a given situation where some of the significant facts occurred in two or more states; and (2) to what extent should the chosen legal system regulate the situation.

...

Although ideally, all choice-of-law theories should intrinsically advance both notions of justice and predictability, they do not always do so. The forum is then faced with problem of deciding which of these two important values should be stressed.

Before a choice can be made, it is necessary for us to determine under what category a certain set of facts or rules fall. This process is known as “characterization,” or the “doctrine of qualification”. It is the ‘process of deciding whether or not the facts relate to the kind of question specified in the conflicts rule.’ The purpose of characterization is to enable the forum to select the proper law. Our starting point of analysis here is not a legal relation, but a factual situation, event, or operative fact. An essential element of conflict rules is the indication of a “test” or “connecting factor” or “point of contact”. Choice-of-law rules invariably consist of a factual relationship (such as property right, contract claim) and a connecting factor or point of contact, such as the *situs* of the *res*, the place of celebration, the place of performance, or the place of wrongdoing.”

Death penalty not violative of the Constitution, nor of the International Covenant on Civil and Political rights

G.R.No.132601, 12 October 1998

ECHEGARAY v. THE SECRETARY OF JUSTICE and THE DIRECTOR OF THE BUREAU OF CORRECTIONS, THE EXECUTIVE JUDGE OF THE REGIONAL TRIAL COURT OF QUEZON CITY AND THE PRESIDING JUDGE OF THE REGIONAL TRIAL COURT OF QUEZON CITY, BRANCH 104

Per Curiam

In 1996, the Court affirmed the conviction of petitioner LEO ECHEGARAY for the crime of rape of the ten-year-old daughter of his common-law spouse and the imposition upon him of the death penalty for the said crime. Petitioner then filed a Motion for Reconsideration questioning the constitutionality of Republic Act No. 7629 (the Death Penalty Law) and the imposition of the death penalty for the crime of rape. The Court in February 1998 found that Congress had complied with the requirements for the re-imposition of the death penalty law and thus, the death penalty law was constitutional. In the intervening time, Congress passed a law changing the

mode of execution from electrocution to lethal injection in Republic Act No. 8177,⁴ and as provided in said law, the Secretary of Justice promulgated the Rules and Regulations to Implement R.A. No. 8177 and directed the Director of the Bureau of Corrections to prepare the Lethal Injection Manual. Petitioner then filed a Petition for Prohibition, Injunction and/or Temporary Restraining Order arguing that R.A. 8177 and its implementing rules are unconstitutional for: (a) violation of the constitutional proscription against cruel, degrading or inhuman punishment, (b) violation of Philippine international treaty obligations, (c) being an undue delegation of legislative power, and (d) being discriminatory.

The Court ruled that execution by lethal injection does not constitute cruel, degrading or inhuman punishment under Section 19, Article III of the 1987 Constitution.⁵ Citing its ruling in *Harden vs. Director of Prisons*, the Court held: “[P]unishments are cruel when they involve torture or lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the constitution. It implies there ‘something inhuman and barbarous, something more than the mere extinguishment (*sic*) of life.’ Would lack of particularly then as to the details involved in the execution by lethal injection render said law ‘cruel, degrading or inhuman’? The Court believes not. ... [T]he implementing details of R.A. 8177 are matters which are properly left to the competence and expertise of administrative officials.”

The Court likewise ruled that the re-imposition of the death penalty did not violate international treaty obligations, particularly, the International Covenant on Civil and Political Rights which was signed and ratified by the Philippines on December 19, 1966 and October 23, 1986, respectively. As stated by the Court:

“Indisputably, Article 6 of the Covenant enshrines the individual’s right to life. Nevertheless, Article 6 (2) of the Covenant explicitly recognizes that capital punishment is an allowable limitation on the right to life, subject to the limitation that it be imposed for the “most serious crimes.” Pursuant to Article 28 of the Covenant, a Human Rights Committee was established and under Article 40 of the Covenant, States Parties to the Covenant are required to submit an initial report to the Committee on the measures they have adopted which give effect to the rights recognized within the Covenant and on the progress made on the enjoyment of those rights within one year of its entry into force for the State Party concerned and thereafter, after five years. On July 27, 1982, the Human Rights Committee issued General Comment No. 6 interpreting Article 6 of the Covenant stating that “(while) it follows from Article 6 (2) to (6) that State Parties are obliged to abolish the death penalty totally, they are obliged to limit its use and, in particular, to abolish it for other than the ‘most serious crimes’. Accordingly, they ought to consider reviewing their criminal laws in this light and, in any event, are obliged to restrict the application of the death penalty to the most serious crimes.’ The article strongly suggests (pars. 2(2) and (6)) that abolition is desirable... The Committee is of the opinion that the expression ‘most serious crimes’ must be read restrictively to mean that the death penalty should be a quite exceptional measure.” Further, The Safeguards Guaranteeing Protection of

⁴ An Act Designating Death by Lethal Injection as the Method of Carrying Out Capital Punishment, Amending for that purpose Article 81 of the Revised Penal Code, as Amended by Section 24 of Republic Act No. 7659.

⁵ Article III, section 19 provides for the right to life.

Those Facing the Death Penalty adopted by the Economic and Social Council of the United Nations declare that the ambit of the term ‘most serious crimes’ should not go beyond intentional crimes, with lethal or other extremely grave consequences.

The Optional Protocol to the International Covenant on Civil and Political Rights was adopted by the General Assembly of the United Nations on December 16, 1966, and signed and ratified by the Philippines on December 19, 1966 and August 22, 1989, respectively. The Optional Protocol provides that the Human Rights, Aiming at the Abolition of the Death Penalty was adopted by the General Assembly on December 15, 1989. *The Philippines neither signed nor ratified said document.* Evidently, petitioner’s assertion of our obligation under the Second Optional Protocol is misplaced.” [Emphasis supplied.]

With respect to the issue of undue delegation, the Court ruled that there was none considering that R.A. 8177 sufficiently described “the job to be done, who is to do it, and what is scope of his authority.” The said law also provides the “standards which define the legislative policy, mark its limits, map out its boundaries, and specify the public agencies which will apply it.”

The Court, however, declared invalid Section 17 of the Implementing Rules for being discriminatory, i.e. in treating women sentenced to death differently from men similarly sentenced. The rule suspended the execution of a woman to within three years next following the death sentence.

OPINIONS OF THE DEPARTMENT OF JUSTICE

Requirements for Congressional approval of loans made under the Official Development Assistance Act

Opinion No.95, S.1996, of 4 November 1996

The issues raised by the World Bank were in regard to the legal effects of Republic Act No. 8182 (“Official Development Assistance Act [ODA]” of 1996), brought to the DOJ through the Department of Finance (DOF). The Bank required confirmation of (1) the steps, procedures and timing through which the Government will comply with Section 4 of the law; (2) the continued authority of the Government to provide a letter of Representations and Assurances on Procurement acknowledging that Bank Guidelines on procurement and use of consultants are and will be recognized and fully applied to Bank-financed projects; and (3) that the Act was not to apply to project loans negotiated before the efficacy of the Act and to loans made to government-owned corporations guaranteed by the Government.

With respect to the first issue, the Bank was specifically concerned with a proviso in Section 4 of the law that required prior congressional approval for ODA-funded projects. The DOJ referred to the implementing rules and regulations of the Act which provided that all “proceeds of loans and grant funds must be included in the annual

national expenditure program to be submitted to Congress for approval.”⁶ Upon consultation with the relevant government agencies, the DOJ determined that the process involved (1) identification of the projects to be funded by foreign funding institutions in the annual programming mission of the government; (2) the submission of identified projects by the implementing agency to the Investment Coordination Committee (ICC) and the National Economic and Development Authority (NEDA) for approval; (3) the DOF then securing Presidential authority and Monetary Board approval to negotiate the funding of the approved project with the foreign funding agency; (4) the inclusion of the annual budgetary requirement of the approved project in the proposed budget of the implementing agency for submission to the Department of Budget and Management (DBM); (5) the submission, by the President, of all approved agency budget proposals in the National Expenditure program to Congress for appropriation; and (6) the submission of new foreign assisted project loans for Congressional approval as part of the Appropriations Bill. Congressional approval may take any or a combination of the following forms: (a) an appropriation of the peso proceeds of the project loan; (b) an appropriation of the counterpart funds for the project loan; and (c) the listing of proposed new foreign assisted projects which may be claimed against the Foreign Assisted Projects Support Fund (FAPSF).

To summarize, a list of foreign-funded project loans are submitted to Congress as part of the Appropriations Bill, which listing includes all foreign assisted projects expected to be negotiated and implemented during the given budget year. The DOJ opined that the above process of project identification culminating in congressional budget approval constitutes compliance with the Act’s provision requiring that “expressed (*sic*) approval of Congress shall be obtained by the Executive Department prior to the negotiation and implementation of projects funded by ODA. ...”

As regards the issue of preferential treatment of Filipino consultants, suppliers and manufacturers, mandated under Section 11 of the ODA law, the DOJ opined that an exception thereto existed in Republic Act 4860, otherwise known as the Foreign Borrowings Act. Under Section 4 of R.A. 4860, the President is granted the discretion “to waive or modify the application of any law granting preferences in connection with, or imposing restrictions on, the procurement of goods or services, ...” In the DOJ’s opinion, Section 4 of R.A. 4860 was not inconsistent with Section 11 of the ODA law and both provisions may be given force and effect. The DOJ likewise opined that the ODA law was enacted precisely to exclude the highly concessional ODA loans from the foreign borrowing limit of \$10 billion prescribed in R.A. 4860 in order “to address the country’s increasing economic needs and investments which require adequate financial funding and infrastructure support.” Further, it was pointed that it was customary practice for creditor-debtor institutions to impose certain conditionalities on consultancy and supplier agreements of loan grants. To hold that the President was without power to waive restrictions and preferences prescribed in the ODA law which may be inconsistent with conditionalities issued by donor-countries/institutions would negate the purpose and intent behind the said law, “which is the optimization of the utilization of the ODA resources, considering that the absence of a presidential waiver flexibility clause will

⁶ Implementing Rules and Regulations for Republic Act 8182, Section 5.1, which provides: “All expenditures, inclusive of counterpart funds and proceeds of loans and grants funds, must be included in the annual expenditure program to be submitted to Congress for approval.”

make it difficult, if not impossible, for the government to avail of ODA loans if the creditor-donor countries/institutions insist on the terms prescribed by their guidelines on consultancy and supplier agreements.”

In light of such a presidential waiver clause, the DOJ opined that the Government had the authority to provide the Representations and Assurances on Procurement acknowledging that Bank guidelines on procurement and the use of consultants will be recognized and fully applied to Bank-financed projects.

With respect to the issue of the prospective application of the ODA law, the DOJ confirmed the Bank’s understanding that the ODA law and its implementing rules and regulations would not apply to loans negotiated before the effectivity of the Act, specifically a loan for the Women’s Health and Safe Motherhood Project negotiated in November 1994. The DOJ pointed out the ODA law clearly limited the retroactive applicability of the law to ODA loans and loan grants contracted on or after 1 January 1995. As to the applicability of the law to loans made to government-owned corporations guaranteed by the Government, the DOJ opined that the ODA law was silent on this issue, stating that the guarantee provision in Foreign Borrowings Act (R.A. 4860) applied.

Official Development Assistance Act

Opinion No.8, S.1997, of 20 February 1997

The issues raised in this Opinion are the same as those raised in Opinion No. 95, S.1996 (summarized above). In this instance, the issues were raised by the Asian Development Bank (ADB). For similar issues, the DOJ merely reiterated its holding in the prior opinion.

First, that the required express congressional approval of ODA project loans is deemed complied with through any, or a combination of the following: (a) an appropriation of peso proceeds of an ODA-project loan; (b) an appropriation of the counterpart funds for an ODA-project; and (c) a list of ODA project loans annexed to the Appropriations Act, the budget for which may be claimed against the Foreign Assisted Projects Support Fund (FAPSF). Thus, as previously opined, the observance of any, or a combination, of the above modes constitutes the required congressional approval under Section 4 of R.A. 8182.

Second, with respect to certain ADB loans negotiated or contracted after 1 January 1995, which is the cut-off date under ODA, it was contended that all such ADB-funded projects were submitted to Congress, for the 1997 Appropriations Sessions, following the procedure enumerated in the preceding Opinion No. 95, S. 1996. The ADB wished to know whether Congressional approval of the 1997 Appropriations Act constitution ratification, equivalent to an express approval of the ADB-financed projects which were not previously passed upon by Congress. The DOJ opined that congressional approval of the 1997 Appropriations Act that identifies the ADB-funded subject project loans in any, or combination, of the modes enumerated in the above paragraph, constitutes the required express congressional approval of ADB-funded ODA loans contracted after 1 January 1995, but not passed upon until the 1997 Appropriations Act.

Third, the DOJ reaffirmed its opinion that the President has the power to waive the requirements of R.A. 8182 prescribing preferences or imposing restrictions on

the procurement of goods and services for ODA-funded projects in accordance with the provisions of R.A. 4860 (The Foreign Borrowings Act).

Fourth, the DOJ similarly opined that while the President is the official authorized by law to contract foreign loans on behalf of the Republic of the Philippines, he may, by issuing Full Powers, “designate a representative to conclude, sign, execute and deliver, for and on behalf, of the Government, the loan agreement and any deed or other document of whatsoever kind and nature which may be necessary or proper for the purpose of executing or implementing the agreement ...”. By investing a representative with such Full Powers, the President is deemed to have delegated to such representative the powers granted him under R.A. 8182, including the power to waive preferences on procurement of goods and services. The DOJ thus confirmed that the presidential waiver under the ODA law is deemed delegated to the President’s representative at the time of the issuance of the Full Powers.

Executive agreements

Opinion No.15, S.1997, of 14 March 1997

The question was whether the Agreement on Cooperative Activities in the Field of Defense and Security between the Government of the Republic of the Philippines and the Government of the Republic of Indonesia was an executive agreement that did not need Senate concurrence.

The Agreement sought to enhance the existing bilateral relationship through defense and security cooperation between the two countries. The scope of the agreement included the joint and combined training and exercises between the Armed Forces of both countries, development of the human resources of the defense ministries and armed forces of both countries, fostering tranquillity in the border areas between the two nations, and the development of the interoperability of their Armed Forces in operations and logistics, communication, electronic measures and countermeasures, and information technology, defense technology, and logistics support system.

The DOJ opined that the said Agreement was indeed an executive agreement, not requiring Senate concurrence. The DOJ cited the Supreme Court ruling in *Commissioner of Customs v. Eastern Sea Trading*, 3 SCRA 356, where the Court held, to wit: “International agreements involving political issues or changes of national policy and those involving international arrangements of a permanent character usually take the form of treaties. But international agreements embodying adjustments of detail carrying out well-established national policies and traditions and those involving arrangements of a more or less temporary nature usually take the form of executive agreements.” The DOJ pointed out that it had issued previous opinions to the same effect on similarly worded defense cooperation agreements.

The DOJ opined that the Cooperative Activities Agreement fell within the definition of an executive agreement. However, it expressed reservation with respect to two clauses of Article III of the said Agreement. The pertinent clauses read: “Willing to promote defense and security technical cooperation within the framework of their respective national laws and regulations; in conformity with the rules and

norms of international law and the United Nations Charter.”⁷ On the other hand, paragraph 1 of the same Article states: “The provisions of this Agreement shall be subject to the respective national laws and regulations of the Parties in conformity with the rules as well as norms of international law.”

The DOJ opined that the harmonization of Philippine laws with the rules and norms of international law through amendments of existing laws falls within the exclusive power of Congress, and must comply with Constitutional processes. Thus, the DOJ suggested that the reference to the condition in the preambulatory clause referring to “conformity with norms and laws of international law and the United Nations Charter” be omitted. As the said clause was thought to be too broad and sweeping, the DOJ opined that any future references to such laws or norms should be accompanied by citing the specific law referred to by either party.

Inasmuch as the Agreement provided that an exchange of instruments would take place 30 days after compliance by each government with its national laws respecting such agreements, the DOJ opined that the Philippine government should wait until the Indonesian government had complied with the requirements of its laws before effecting such an exchange.

Applicability of the nationality requirement for the advertising industry to a foreign press agency that solicits advertisements from Philippine clients for advertising abroad

Opinion No.37, S.1998, of 18 March 1998

The issue is whether the 70-30 per cent Filipino-foreign equity restriction with respect to the advertising industry is applicable to a foreign press agency (corporation) which solicits advertisements, through its representatives, from prospective clients in the Philippines, such as government agencies which desire to promote or advertise the Philippines abroad. The DOJ opined that a foreign press agency/corporation is not covered by the nationality requirement under Section 11(2), Article XVI of the Constitution, provided that the advertising is done abroad with the use of foreign mass media. The said equity restriction applied when the use of mass media in the Philippines is involved. Thus, when advertising is carried on by mass media outside the Philippines, the person performing such advertising activity cannot be deemed to be engaged in the advertising industry in the Philippines.

A corollary question is whether such foreign press agency/corporation which solicits advertisements from clients in the Philippines for placement in mass media abroad is deemed to be “doing business” in the Philippines and, therefore, subject to regulation under Philippine laws. The DOJ opined that in such a case, the said foreign press agency, through its representatives in the Philippines, is considered to be “doing business” in the country. The DOJ cited the Supreme Court which held, in a number of cases, that “if a corporation performs acts for which it was created or exercises some of the functions for which it was organized, the amount or volume

⁷ Preambulatory Clause, Article III, Agreement on Cooperative Activities in the Field of Defense and Security between the Government of the Republic of the Philippines and the Government of the Republic of Indonesia.

of the business is immaterial and a single act of that character may constitute doing business. ... In this regard, it is the performance by a foreign corporation of the acts for which it was created, regardless of volume of business, that determines whether a foreign corporation needs a license or not." Thus, if the foreign press agency/corporation solicits advertisements from Philippine clients, it is deemed to be doing business in the Philippines and as such must secure a license to do business from the appropriate government agency to enable the government to exercise jurisdiction over their activities in the country.

Constitutionality of the Philippine-US Visiting Forces Agreement

Opinion No.94, S.1998, of 10 August 1998

The issues raised were (1) the constitutionality of the Visiting Forces Agreement (VFA); and (2) the validity of the criminal jurisdiction provisions of the VFA. The VFA, between the Government of the United States and the Government of the Republic of the Philippines covered US military and civilian personnel in the Philippines for so-called war games exercises between the Armed Forces of the two countries.

With respect to the issue of constitutionality, the DOJ opined that the VFA did not contravene the Constitution, and did not constitute an abdication of Philippine sovereignty. The DOJ, citing Supreme Court doctrine, reasoned that it is well settled in international law that a state, in the exercise of its sovereignty, "may, by its consent, express or implied, submit to a restriction of its sovereign rights... That is the concept of sovereignty as auto-limitation... A State then, if it chooses to, may refrain from the exercise of what otherwise is illimitable competence."⁸ The DOJ also pointed out that the Court, in several opinions, has held that "the Philippines may, by treaty or agreement, allow the United States or any foreign nation to exercise jurisdiction over certain offenses committed within certain portions of its territory."

Corollary to the issue of constitutionality was whether the VFA violated the constitutional policy of freedom from nuclear weapons in the Philippines. Again, the DOJ opined that it did not. The constitutional provision in question, Art.11, Sec. 8, provides, "The Philippines, consistent with the national interest, adopts and pursues a policy of freedom from nuclear weapons in its territory." The DOJ, citing the debates of the Constitutional Commission, opined that the said provision does not ban totally and absolutely nuclear arms within Philippine territory. Whether or not nuclear weapons are to be allowed is to be decided on the basis of the "national interest" to be defined by the executive and legislative departments." (Concom Records, Vol. IV, p. 814) Under the VFA, the movement of vessels and aircraft within Philippine territory is always subject to prior approval by the government and to the agreed implementing agreements. The DOJ pointed out that as the US policy is neither to deny nor confirm the presence of nuclear arms on board its ships, the Philippine government must rely on the US government conforming, in good faith, to its treaty obligations and reasonably assume that the US would not willfully disregard the sovereignty of the Philippines.

⁸ Reagan v. Commissioner of Internal Revenue, 30 SCRA 968, 1969.

Neither are the criminal jurisdiction provisions, whereby the Philippine government may waive its criminal jurisdiction upon request of the US government, constitutionally infirm. Again, it was stated that as an exercise of its sovereignty, the Philippine government may legally waive its criminal jurisdiction over certain offenses committed by visiting US personnel. The DOJ cited several Supreme Court cases that upheld the constitutionality of past Military Bases Agreements allowing the US to exercise criminal jurisdiction over certain offenses committed within the US military bases. The rationale underlying said rulings was the principle of international law which exempts foreign troops passing through or stationed in a friendly country with its permission from the civil and criminal jurisdiction of such country, and by virtue of the constitutional provisions incorporating general principles of international law as part of the law of the land, such principle is deemed part of Philippine law. The waiver of jurisdiction conforms to the theory of sovereignty as “auto-limitation” which recognizes the sovereign prerogative of states to impose limitations on the exercise of its otherwise illimitable sovereign powers.

Constitutionality of opening the retail trade sector to foreign investors

Opinion No.155, S.1998, of 24 December 1998

The issue raised was whether the opening of the Philippine retail trade sector to foreign investments was constitutional. The issue arose in connection with the various legislative proposals before the House of Representatives, which sought to liberalize the retail trade sector by allowing foreign investments in the said sector.⁹

The DOJ opined that there was no legal or constitutional impediment to the opening of the Philippine retail trade sector to foreign investments. The pertinent constitutional provisions are Art. II, Section 19, and Art. XII, Sections 1, 10, 12 and 13.¹⁰ In the DOJ’s opinion, so long as retail trade liberalization measures conform to the aforementioned constitutional provisions, then such measures are constitutional. The DOJ, however, also pointed out that Section 10, Art. XII of the Constitution

⁹ The Retail Trade Liberalization Act was passed in 1999.

¹⁰ Section 19, Art. II provides: “The State shall develop a self-reliant and independent national economy effectively controlled by Filipinos.

Section 1, Art. XII provides: “... The State shall protect Filipino enterprises against unfair foreign competition and trade practices.”

Section 10, Art. XII provides: “... The Congress shall enact measures that will encourage the formation and operation of enterprises whose capital is wholly owned by Filipinos.

In the grant of rights, privileges and concessions covering the national economy and patrimony, the State shall give preference to qualified Filipinos.

The State shall regulate and exercise authority over foreign investments within its national jurisdiction in accordance with its national goals and priorities.”

Section 12, Art. XII provides: “The State shall promote the preferential use of Filipino labour, domestic materials and locally produced goods, and adopt measures that help make them competitive.”

Section 13, Art. XII provides: “The State shall pursue a trade policy that serves the general welfare and utilizes all forms and arrangements of exchange on the basis of equality and reciprocity.”

granted Congress the power and discretion not only to prescribe the percentages for certain areas of investment but also the discretion to choose which areas of investment would be limited to Filipinos. This legislative discretion, however, did not apply to public utilities (Sec. 11, Art. XII), natural resources (Sec. 2, Art. XII), mass media (Sec. 11 [1], Art. XII), and educational institutions (Sec. 4 [27], Art. XIV), which the Constitution expressly reserves to Filipinos. There being no outright prohibition on foreign participation in the retail trade sector, Congress had the power to legislate its liberalization.

Legal implications of the full implementation of the Agreement on Trade-Related Investment Measures (TRIM)

Opinion No.88, S.1999, of 11 October 1999

The issues raised were in relation to the legal implications of the full implementation of the Agreement on Trade-Related Investment Measures (TRIM) under the auspices of the World Trade Organization (WTO) vis-à-vis the continued enforcement of certain laws that conflict with the provisions of the Agreement on TRIM. The specific law in question was Executive Order No.259 (An Act to Rationalize the Soap and Detergent Surfactant Industry and Thereby Promote and Expand the Utilization of Chemicals Derived from Coconut Oil and for Other Purposes).

Specifically, the following questions were raised: (1) If E.O.259 is not repealed or amended to conform to the Agreement on TRIM on or before 31 December 1999 (the said TRIM Agreement becoming effective 1 January 2000), what would be the legal implications where the country is not compliant with its commitments under the Agreement? and (2) Would the effectivity of the TRIM Agreement render E.O.259, *ipso facto*, ineffective or unenforceable?

The inconsistencies between the executive act and the TRIM Agreement relate to the commitment of member countries under TRIM to adopt the national treatment principle under Article III (4) and to eliminate quantitative restrictions under Article XI (1) of the 1994 General Agreement on Tariff and Trade (GATT), on the one hand, and the provisions of Sections 2 and 3 of E.O.259 which require local sourcing of raw materials in the manufacture of detergent products in the country and which requirement is likewise applied to imported products.¹¹

¹¹ The relevant GATT provisions and sections of Executive Order No.259 follow:

- 1994 GATT, Article III (4): "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. ..."

- 1994 GATT, Article XI (1), "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

- E.O. No.259 (1987): "Section 2. The soap and detergent surfactant industry shall be subject to a rationalization program requiring increasing local content in the usage of its raw materials which

The TRIM Agreement, in Article 5(2), provides that developing countries, such as the Philippines, have five (5) years from the date of entry into force of the Agreement, or until 31 December 1999, within which to comply with its commitment of eliminating trade-related investment measures which are identified to the WTO as inconsistent with the TRIM Agreement.

The DOJ opined that upon the effectivity of the TRIM Agreement, it does not automatically, or *ipso facto*, repeal or render the provisions of E.O.259 ineffective or unenforceable. The executive order in question was issued in 1987 by then President Corazon who, at the time, exercised both executive and legislative powers. Thus, E.O.259 is in the nature of legislation, requiring a legislative fiat to repeal or amend its provisions.

The TRIM Agreement, a multilateral treaty, is placed in the same category as an Act of Congress. It has the effect of automatically invalidating or superseding local law inconsistent with its articles, provided the treaty is later in date and its provisions are self-executing. Thus, when a treaty is not self-executing but requires local legislation to carry into effect its provisions, it cannot have the effect of automatically superseding or suspending the operation of a statute.

The requirement, under Article 5(2) of the TRIM Agreement, that developing countries comply with the commitment of eliminating "all TRIMs which are notified," clearly indicates that the provisions of the Agreement are not self-executing, requiring a Member country to enact appropriate law to effect the provisions of the treaty. Therefore, the TRIM Agreement does not automatically repeal or supersede E.O.259, which is a legislative measure.

However, given that the Philippines is a signatory to the TRIM Agreement, it is required to comply, in good faith, with its obligations under the said Agreement, in accordance with the principle of *pacta sunt servanda*. Thus, the Philippines is bound to eventually take measures to harmonize its laws with existing treaty obligations.

do not endanger the environment to a minimum of 20% the first year, 40% the second year, up to a minimum of 60% the third year and thereafter."

- E.O. No.259: "Section 3. Importation of raw materials and finished products of the industries covered by the rationalization program may be restricted subject to the guidelines set by the BOI."